



Tis the Season To Be Liable

IT'S HOLIDAY party time once again. Bring out the mistletoe, the holiday songs, and the good cheer. But be careful:

A holiday party is not a time to lose your good manners or forego good taste.

Increasingly, companies are facing lawsuits from employees who are injured because of the actions of co-workers at company-sponsored parties. Many companies serve alcohol at holiday parties and other events. That may result in excessive drinking, which can prompt employees to lose their good judgment.

Some employees don't realize that when they're attending a company function, all of the rules and liabilities associated with regular business operations still apply. For instance, if someone drinks too much alcohol at a company-sponsored event and injures another person or damages property, the employer may be held liable. Similarly, if a manager sexually abuses (verbally or physically) an employee, he or she may be liable, along with the company, for sexual harassment.

Courts have ruled that offensive actions and comments, such as unwelcome touching, at a holiday party, combined with previous harassment incidents, are sufficient to be deemed sexual harassment. (See the box for cases in which a sexual harassment suit resulted from a supervisor's or company's actions at an office party.)

In September's column, we gave the Equal Employment Opportunity Commission's definition of sexual harassment:

"Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment."

Part of the Civil Rights Act of 1964

FACTS

A supervisor kissed an employee without consent at a company holiday party after harassing her with sexual jokes and innuendoes at work.

At a noncompany-sponsored party (attended by employees), a supervisor, who had been drinking too much alcohol, touched two different employees' breasts and tried to kiss the employees. The company had taken action against the supervisor in the past for sexual harassment.

A supervisor hugged an employee at a holiday party and tried to kiss her. She thwarted his advance. Four months later, she was fired for poor job performance. She sued for sexual harassment.

A female stripper performed at a company function in front of the owner. Two female employees quit their jobs and sued the company for creating a hostile work environment.

A company decorated the tables at a company holiday party with bare-breasted mermaids.

FINDINGS

The company was liable, based on the office party incident coupled with a previous activity that created a hostile work environment.

The company was found liable for negligent supervision and retention based on the supervisor's previous harassing behavior at work. An employer has a duty to take prompt action after becoming aware of an employee's sexual harassment. The company was not found liable for battery and negligence because it didn't sponsor or pay for the party. It wasn't liable for the supervisor's actions because they didn't occur in a work context.

The company was found not liable. One incident, unless it is severe, is not considered sexual harassment.

The company is possibly liable. An owner's acquiescence and participation can be relevant to a sexual harassment claim because it implies that the company knew of the harassment.

The company is probably not liable. An employee must prove that an employer's action created a hostile work environment.

makes it "an unlawful employment practice for an employer to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's sex."

Sexual discrimination in the workplace has been held to be a violation of Title VII. The U.S. Supreme Court has held that a person may establish a sexual harassment case by proving that discrimination based on sex created a hostile or abusive work environ-

ment. The Court states that in order to prove sexual harassment, it must be "sufficiently severe and pervasive," and it must "unreasonably interfere with an individual's work performance, or create an intimidating, hostile, or offensive work environment."

Further, the harassment must be viewed in the context of whether a reasonable person would find that the conduct created a hostile or abusive work environment. The Court suggests that the following factors should be reviewed regarding dis-

criminy conduct:

- ▶ the frequency and severity
- ▶ whether it is physically threatening or humiliating, or a "mere offensive utterance"
- ▶ whether it unreasonably interferes with an employee's performance.

Foreseeability and agency

When reviewing cases that arise from the actions of employees at holiday parties, courts examine the facts and their application to the factors outlined by the Supreme Court, coupled with the "foreseeability" of the actions. Most cases involve more than one occurrence of offensive conduct. Thus, when harassment occurs prior to a holiday party or other company-sponsored event and is coupled with harassment at the party, courts will find that the condition of foreseeability is usually satisfied.

Next, courts determine whether the actions of a supervisor at a company social function interfered with an employee's work or created a hostile work environment. An employee charging harassment must prove that the actions, either alone or coupled with other incidents, created a hostile environment or interfered with his or her work—and that a "reasonable person" would agree.

To determine an employer's liability under sexual harassment laws, "agency" must be proved. That means that an individual qualifies as an employer under Title VII if he or she serves in a supervisory capacity and exercises control over an employee's hiring, firing, and conditions of employment. In such situations, a supervisor operates as the alter ego of his or her employer, and the employer is liable for the actions of the supervisor whether or not the employer knew of the supervisor's conduct. Under agency, an employer is responsible for monitoring the powers that it delegates to its employees.

A key issue in company-party sexual harassment suits in which a supervisor allegedly sexually harasses an employee is whether an agency relationship exists. Agency usually applies when a company pays for or sponsors an event. However, in cases in which a supervisor harasses an employee at a noncompany-sponsored

event, agency can be difficult to prove. For example, when an employee is sexually harassed at a dinner that he or she is required to attend as part of a job and the dinner is paid for by the company, courts have found that agency exists. However, a court has found that agency does not exist when an employee is sexually harassed by his or her supervisor at a noncompany-sponsored event and the offensive action occurred on only one occasion.

Although a company doesn't want to act like the Grinch who stole Christmas, it needs to protect its employees against offensive behavior and itself from liability. Here are some suggestions for employers when holding social events:

- ▶ Inform employees that the same actions that are unacceptable at work are also unacceptable at a company party. Many employees don't understand that a company event is a company event. A company can protect itself by clarifying the proper behavior and policies for work and social functions.

- ▶ Either don't serve alcohol or restrict employees' consumption. Many companies serve only beer and wine, with a one- or two-drink limit. That lessens the chance that employees will drink too much and act improperly.

- ▶ Create alternative celebrations. For example, some companies host luncheons or rent health clubs. Most employees won't drink alcohol during such events.

- ▶ Request that employees not give each other offensive "gag" gifts.

- ▶ Make sure that employees who have acted improperly in the past are either not invited to the function or are supervised to ensure that they don't repeat their behavior.

- ▶ Be sure that the company's insurance policy covers mishaps at "special company events," including holiday parties.

As a last resort, don't have a holiday party. That may protect a company from liability, but it may also hurt employees' morale.

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